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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 489

MARY MORTON WEST, Osage Allottee No. 192,
Appellant,

VERSUS

OKLAHOMA TAX COMMISSION,
Appellee.

Appeal from the Supreme Court of the State of Oklahoma

ANSWER BRIEF of Appellee

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MARCH, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES

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Appeal from the Supreme Court of the State of Oklahoma

ANSWER BRIEF

STATEMENT OF THE CASE

The appellee does not question the jurisdiction of this Court.

The parties entered into a stipulation covering the facts (R. 12-15) which we summarize as follows:

Charles West, Jr., was a restricted, full-blood, adult unallotted Osage Indian. He died intestate September 2, 1940, while domiciled in and a resident in good faith of the State of Oklahoma where he had lived all of his life. No certificate of competency had ever been issued to him. He left surviving his mother, Mary Morton West, who is a full-blood, restricted Osage Indian and to whom the entire estate passed as the sole heir at law, except for an amount paid (and transferred) to the deceased's widow.

All of the property of Charles West, Jr., is restricted property in the possession and under control of the United States acting through the Secretary of the Interior.

The United States retained in a separate account sufficient funds to pay the inheritance taxes assessed and that Osage funds are paid to the United States Treasury and held by it undesignated as to members of the Tribe and simply as Osage Tribal Trust Fund. (The interest of the individual Osage is, of course, fixed by whatever interest he may own in a headright or headrights).

No penalty or interest will be charged or collected for any time prior to thirty days subsequent to the recording of the mandate after final decision herein.

At the death of Charles West, Jr., he owned:

(a)	1 and 919/2520ths. Osage Indian mineral headright. Value	$10,235.12
(b)	Trust funds in U. S. Treasury. Value	4,745.52
	Interest that had accrued thereto	398.90
(c)	Surplus funds in U. S. Treasury. Value	29,046.27
(d)	United States bonds. Value	70,949.31

(e)	Building and Loan Stock	1,485.06
(f)	Inherited real estate, other than homestead. Value (This included an interest in some 25 tracts of land. See R. 4B)	12,226.10
(g)	3/28th interest in Masonic Mortgage. Value	1,071.43
(h)	Purchased real estate. Value	5,000.00
(i)	Homestead. Value	1,833.33
(j)	Household furniture. Value	736.00
	Total Value	$137,727.04

It was stipulated that properties of Classes a, b, c, d, e, and g were never subjected to taxes; that properties of Classes f and h were. (The parties were referring to ad valorem taxes). The source of the properties is also stipulated.

The Oklahoma Tax Commission valued the estate at $132,727.04 (this was the value after allowing a homestead exemption of $5,000.00), a further deduction of $21,507.86, representing the basic exemption of $15,000.00, and expense of last sickness, expense of administration, etc., totalling $6,507.86, and subjected to tax $111,219.18. The tax imposed was $4,373.15, together with a penalty in the amount of $940.20, or a total of $5,313.35.

The only funds coming into the hands of the administrator was $5,606.50 released to him to pay claims and the expense of administration.

The estate was retained in trust by the United States after administration to the same extent as it was before administration.

It was further stipulated that the largest payment on a headright was $12,000.00 in 1924, the smallest was $598.00 in 1933 and $945.00 in 1940.

In the appellant's brief, reference is frequently made to the following quoted portion of the stipulation:

> "A mineral headright is the undivided 1/2229th part of all minerals in Osage County, Okla., formerly the Osage Nation, title to which minerals has been, is and will be held in trust by the United States until 1984 or such further time as Congress may provide [*Globe Indemnity Co.* v. *Bruce*, 81 Fed.(2d) 143, l. c. 147-150], and had never been subjected to taxation."

It is argued by appellant that the Oklahoma Tax Commission in effect, stipulated that the beneficial title to the properties of the Osages was in the United States. This portion of the stipulation is limited to and by whatever the Court in fact held in the *Globe Indemnity case*, in which case the court held,

> "* * * that the beneficial title to the funds and moneys vested in the individual members of the tribe,"

and

> "* * * that a present equitable interest in the lands, moneys and mineral interest vested in the members of the tribe and on the death of a member descends to his heirs."

The quoted language follows the statement that,

> "* * * the United States took the legal title to the funds and money in trust,"

and which language when construed in connection with the language that follows should be construed to mean that the United States took and held only the naked legal title.

The appellant protested the assessment of estate taxes in its entirety (R. 9-11). The Oklahoma Tax Commission sustained the assessment as made and the Supreme Court of Oklahoma affirmed the Tax Commission. Therefore, the right of Oklahoma to impose a tax on all of the properties included in the assessment, is now before the Court unless the concession of appellant at Page 14 of her brief be considered as a withdrawal of the protest as to all real estate included in the assessment. As hereinbefore stated, $26,507.86 was allowed as deductions and a part thereof was a homestead deduction of $5,000.00

The appellee asserts that the case of *Oklahoma Tax Commission* v. *United States*, 319 U. S. 59, 63 Sup. Ct. 1279 (hereinafter referred to as the *Five Tribes case*), adjudicates all issues raised and presented by appellant favorably to the appellee. In order to show that the *Five Tribes case* is decisive here, we analyze that case.

The deceased full-blood Indians (Creeks and Seminoles) were restricted, and this was true of most of their heirs.

The property comprising the estates was of the same general class and character as the property here involved; land exempt from direct taxes; land not exempt from direct taxes; restricted cash and securities held by the Secretary of the Interior, and miscellaneous property and insurance.

In that case as here, the Indians were citizens of Oklahoma and the United States and the estates consisted of properties of considerable value.

Oklahoma intended to tax the estates of all Indians and her past actions were consistent with such avowed intent.

Restriction "without more, is not the equivalent of a congressional tax immunity for the cash and securities" (this would apply to properties purchased from surplus restricted cash).

The case of *United States* v. *Rickert*, 188 U. S. 432, and cases preceding that case, are to be distinguished because (1) the Indians were not citizens when those cases arose, (2) it was necessary for the United States to protect the Indians from violence, (3) the Indians retained their tribal form of government, (4) as in the *Rickert case*, title was held in trust for the Indians when the case arose (but, consistent with the *Rickert case*, title was in the Osages after the allotment deeds were executed and approved), and (5) all of which facts led to the Federal government invoking the federal instrumentality rule and thereunder denying to States the right to tax the Indians. "The underlying principles on which (former) decisions are based do not fit the situation of the Oklahoma Indians" (not limiting the term "Oklahoma Indians" to members of the Five Civilized Tribes, but including all Oklahoma Indians), which resulted from (1) citizenship being bestowed on the Indians, (2) the disappearance of tribal autonomy and (3)

the fact that the United States does not hold the beneficial title to the properties of the Indians.

The purpose of Congressional Acts extending the restricted period was to protect the Indians as individuals from those who might take advantage of him and to make certain of his lands free from ad valorem taxes. The purpose was not to expand tax exemptions, and did not by implication prohibit estate taxes.

"Congress could not have intended that the minerals themselves should be subject to taxation, but that the proceeds of their sale, even further removed from the land itself, should be immune." Tax exemptions are not granted by implications. (Congress permitted the imposition of a gross production tax on both Osage and Five Civilized Tribes production). Minerals, as such, prior to production, are not and have never been subject to taxation in Oklahoma).

"If exemption exists it must derive plainly from agreements with the Indians" and "if Congress intends to prevent the State of Oklahoma from levying a general nondiscriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences."

While acts of Congress dealing with the Indians will be construed in accord with the generous and protective spirit always shown them by the United States, it cannot be assumed that Congress intended "to aid the Indians by

permanently granting them immunities from taxes which they are as able as other citizens to pay." That:

> "Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."

Congress has passed laws under which Indians have become full-fledged citizens of Oklahoma.

> "Oklahoma supplies for them and their children schools, roads, courts, police protection and all the benefits of an ordered society. Citizens of Oklahoma must pay for these benefits. If some pay less, others must pay more."

Since Oklahoma became a State the loss to it from tax immunities granted the Indians has totaled more than $125,000,000.00 It cannot be implied that Congress "intended the burden to be borne so heavily by one state." (It was pointed out in a foot-note that the Osages are reported to own property valued at $31,968,000.)

> "But there is a complete absence of any evidence of congressional belief that these exemptions are required on equitable grounds, no matter on which sovereign the burden falls. Here is a tax based solely on ability to pay, 'Only the same duties are exacted as from our own citizens. The burden must rest somewhere. Revenue is indispensable to meet the public necessities. It is unreasonable that this small portion of it shall rest upon these Indians.' *The Cherokee Tobacco, supra,* 11 Wall., Page 621, 20 L.ed. 227."

Tax favoritism has been swept aside by the courts in many instances by (1) permitting a state to impose an income tax upon government employees; (2) permitting

the federal government to tax income of state employees; (3) permitting judges to be taxed as other citizens and by "repudiating former decisions seriously limiting state and federal power to tax. The trend of these cases should not now be reversed."

Cash, securities and personal property were not exempt from an Oklahoma estate tax.

All lands not exempt from direct taxes are subject to the Oklahoma estate tax, but the homestead is exempt.

The appellant contends that the *Five Civilized Tribes case* is not decisive here for the reason title does not rest in the Osages but did rest in the members of the Five Civilized Tribes.

She asserts that the United States holds title to all of the restricted properties of the Osages and that a restricted Osage Indian, therefore, does not have such an interest in his restricted properties, nor does his heir or devisee have such an interest therein, as to permit the imposition of an estate tax.

The appellee counters with the following general propositions:

PROPOSITION No. 1

The title of a restricted Osage in his properties is for all practical purposes the same as that of a restricted member of the Five Civilized Tribes.

The tax here sought to be imposed (an estate tax) is an excise tax. The tax is imposed upon the shifting of economic benefits and the privilege of transmitting or

receiving such benefits. It is not levied on the property of which an estate is composed.

In *McGannon* v. *State*, 33 Okla. 145, 124 Pac. 1063, at Page 150 of the Oklahoma Reports, the court stated:

> "(1) An inheritance tax is not one on property, but on the succession. * * *"

In *In re: Whitson*, 88 Okla. 197, 212 Pac. 752, the surviving husband, W. Whitson, made the contention that under the statutory law of Oklahoma one-third of the estate of his wife was not subject to an inheritance tax, for the reason his wife under the law could not have willed more than two-thirds of her estate to others. He asserted that, "one-third of the estate passed to the husband by operation of law, and (was) therefore not subject to inheritance tax."

In answering this contention the court at Page 199 of the Oklahoma Report quotes with approval from a case from another jurisdiction as follows:

> "* * * And if a condition be that the kindred or legatees shall pay a bonus this is not a tax imposed on their property or anybody else. * * *"

The court held that the husband took under his wife's will and all of the estate was subject to tax.

In 28 Amer. Jur., P. 12, Sec. 10, the author states that an estate tax,

> "* * * is an excise tax imposed on the privilege of transmitting or receiving property upon the death of the owner."

The author, at Page 17 of the same volume points out that the United States can impose an estate or inheritance tax although the United States does not have power to re-

gulate the devolution of estates, and, it, therefore, imposes such a tax notwithstanding the estate does not pass under any law of the United States.

In the case of *Landman* v. *Commissioner of Internal Revenue* (C. C. A. 10th), 123 Fed.(2d) 787, *certiorari* denied, 315 U. S. 810, the Superintendent of the Five Civilized Tribes made the same contention in connection with the imposing of federal estate tax on the estate of a restricted full-blood Creek Indian as is here made by appellant. The Circuit Court rejected the contention and held the estate taxable.

The substantial facts in the *Landman case* were these. Jeanetta Tiger, a full-blood, restricted Creek Indian, died seized of a restricted allotment, having an agreed value of $3,000.00, Liberty Bonds having an agreed value of $227,243.41, and cash with the Superintendent of the Five Civilized Tribes in the amount of $4,754.89. "The Liberty Bonds represented the invested proceeds derived from the production of oil and gas from the allotment, all of which were restricted funds held by the Secretary of the Interior under the direct supervision of the Superintendent of the Five Civilized Tribes."

The court points out that,

> "Title to whatever articles were purchased for the benefit of the decedent was retained in the United States. The decedent had no control whatsoever over the restricted funds, except the right to the exclusive benefit thereof, or so much as in the judgment of the Superintendent was required for the maintenance of herself and her family. * * *"

That,

> "She had the exclusive right to the possession of the allotment and retained the same as her residence. Upon the death of the decedent, the allotment and funds passed to her heirs, consisting of a husband, seven living children and three grandchildren, according to the laws of descent and distribution of Oklahoma. See *Caesar* v. *Burgess* (C.C.A. 10th), 103 Fed.(2d) 503. The heirs are likewise restricted Indians and the estate passed to the heirs by the simple expedient of transferring the account of the decedent with the United States Treasury to the restricted heirs according to their respective shares, which was effected by a book-keeping transaction in the office of the Superintendent of the Five Civilized Tribes."

Under these facts, it must be admitted that the full-blood Creek Indian woman was as highly restricted in connection with the use of her properties as was possible, and that such was true of her heirs. This situation is what caused the Superintendent to urge that none of the interests of the Indians was more than a "hollow interest in the estate," and that this interest did not amount to an estate within the meaning of the federal estate act. The superintendent further contended that since the properties involved were exempt from all form of taxes, the estate was exempt from an estate tax. The contentions so made by the Superintendent were answered as follows:

> "We can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward which would justify the application of the instrumentality doctrine. The power and the control of the Superintendent over the estate of the Indian ward was no more than the mere exercise of a governmental function for the benefit of a private citizen.

No public purpose or end is sought to be effected, except insofar as it becomes the duty of the government to fulfill its historical obligations to a class of its citizens, recognized as a dependent people. This is especially true when the so-called instrumentality doctrine is considered in the light of the recent decisions which bear upon this question" (Citing cases).

At Page 790 the court points out that an estate tax s not upon the property of the estate, but is an excise tax on the shifting of economic benefits from the dead to the iving. We quote this portion of the opinion, omitting citaions:

"When considered in this light, it is plain that the exemption from taxation accorded the Creek Indians, such as the decedent, cannot be extended to the imposition of a tax on the 'transfer of the net estate of every decedent dying after the enactment of this act.' This is made more abundantly clear by the decisions which have defined the nature and character of the estate tax as an excise tax upon the shifting of economic burdens and benefits, or on the privilege of transferring property of decedent at death (Citing cases). 'An estate tax is not levied upon the property of which an estate is composed.' *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 59 S. Ct. 692, 693, 83 L.ed. 1104.

"There is nothing in the treaties or the acts of Congress, confirmatory thereof, which prohibits the imposition of a tax on the right to inherit or succeed to non-taxable property rights. Here the tax falls upon the transfer or shifting of the economic benefits and not upon the property of which the estate is composed. It therefore is not within any constitutional immunity growing out of a contract or agreement between the United States and the Creek Indian, as characterized by the Act of April 26, 1906."

The *Landman case* was cited in the *Five Civilized Tribes case,* with approval. We quote that portion of the opinion from Page 608 of the U. S. Report:

> "* * * A federal court has held, in a well reasoned decision defended before us by the Solicitor General of the United States, who is not a party to this action, that an Indian's estate is subject to the federal estate tax. *Landman* v. *Commissioner* (C.C.A. 10th), 123 Fed. (2d) 787. Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them from similar state taxes."

The United States imposes a federal estate tax on the estates of restricted Osages. This fact is hereinafter discussed at some length.

The Restricted Osages Have a Restricted Fee Simple Title

This Court has held that a restricted Indian, though title to his land be held in trust by the United States, has a fee simple title in his allotment. We cite and quote from cases where this Court so held.

In *United States* v. *Paine Lumber Co.,* 206 U. S. 467, 27 S. Ct. 697, this Court in speaking of the title of a restricted Indian said:

> " * * * The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Libby* v. *Clark,* 118 U. S. 250, 30 L.ed. 133, 6 Sup. Ct. Rep. 1045. The title is held by the United States, it is true, but it is held 'in trust for individuals and their heirs to whom the same was allotted.' * * * The land is not the land of the United States, and the time when cut did not become the property of the United States. * * * "

In that case a treaty with the Stockbridge and Munsee Indians provided for allotment by the council of the tribe, under the direction of the superintendent, with full right in the allottee to take immediate possession, but the United States was to hold title in trust until a patent was issued to the individual allottees. In the instant case, as hereinafter fully discussed, there was no provision in the Osage Allotment Act by which title was held in trust for the allottee. Therefore, the title of a restricted Osage Indian cannot be inferior to that held by the Stockbridge and Munsee Indians.

The character and quantum of title that passes under a trust patent to a restricted Indian was directly at issue in the case of *Oklahoma* v. *Texas*, 258 U. S. 574, 42 Sup. Ct. 406. In that case conflicting claims were made to the bed of the Red River. Among other contentions made, was the contention that no right passed to the river bed under allotments to restricted Indians prior to the issuance of a final patent. In disposing of this contention this Court said at page 596 of the U. S. Report that:

> "The Indian allotments were made in 1909 and 1910, but have not been carried to final patents. They are evidenced by trust patents, so-called, wherein the United States engages to hold the land for a period of 25 years 'in trust for the sole use and benefit' of the allottee, or of his heirs in the event of his death, and at the end of the trust period to convey the same to him, or to his heirs if he be not then living. The contention is made that no right to the river bed could pass under these allotments in advance of the issue of the final patent. Even if this were so, it well may be

> doubted that it would enable strangers to fasten any claim on or appropriate the bed in front of the allotments. But we think it is not so. The allotments when perfected passed the equitable title and beneficial use to all that would have passed under a full patent. The purpose of the holding in trust by the United States is to prevent allottees from improvidently alienating or incumbering the land, not to cut down or postpone their rights in other respects."

The character of a restricted Osage Indian's title is clearly shown by the applicable treaties and acts entered into and passed in connection therewith and which we will now discuss.

In July, 1866, the United States entered into a treaty with the Cherokee Tribe of Indians, by the terms of which it was agreed that the United States might settle friendly Indians in that part of the lands of the Cherokees lying west of the 26th degree of longitude. This land had theretofore been by the United States conveyed to the Cherokees to be by them held in common, and is the land later conveyed to the Osages. It was further provided in the treaty that the boundaries of each district should be distinctly marked, and the land conveyed in fee simple to each of the friendly tribes, to be held in common or by their members in severalty as the United States might decide. We quote this last referred to provision:

> "ARTICLE XVI. The United States may settle friendly Indians in any part of the Cherokee country west of 96°, to be taken in a compact form in quantity not exceeding one hundred and sixty acres for each member of each of said tribes thus to be settled; the boundaries of each of said districts to be distinctly

marked, *and land conveyed in fee simple to each of said tribes to be held in common or by their members in severalty as the United States may decide.*" (Emphasis supplied.)

In 1883, pursuant to the treaty with the Cherokees, the Cherokees, as first party, and the United States executed a deed to the lands covered in the treaty of 1866.

The first two paragraphs of the deed read as follows:

"THIS INDENTURE made and entered into this fourteenth day of June A. D. eighteen hundred and eighty three, between the Cherokee Nation, by Dennis W. Bushyhead, Principal Chief, Richard M. Wolfe and Robert B. Ross, delegates of said Cherokee Nation, for and in behalf of said Nation, of the first part, and the United States of America, in trust for the use and benefit of the Osage and Kansas Indians, of the second part, Witnesseth: that,

"WHEREAS by the sixteenth Article of the treaty concluded July nineteenth, A. D. eighteen hundred and sixty six, between said Cherokee Nation and the United States, the said United States acquired the right 'to settle friendly Indians on any part of the Cherokee country west of the ninety six degree' of west longitude, under certain limitations therein mentioned, and"

There follows recitations concerning an Act of Congress of 1872 by which certain land was set aside for the use of the Great and Little Osage Tribes; an Act of Congress under which the proceeds of the sale of Osage lands in Kansas was set apart to the credit of the Cherokee Nation and an Act of Congress by which certain monies was appropriated to be paid into the treasury of the Cherokee Nation. It was then recited that in consideration of certain sums of money the Cherokees convey the land therein de-

scribed to the United States "in trust nevertheless and for the use and benefit of the said Osage and Kansas Indians."

The habendum clause reads as follows:

> "TO HAVE and TO HOLD the said premises, as above described with the appurtenances, unto the said party of the second part, for the use and purposes aforesaid."

Before discussing the provisions of the deed further, we wish to direct the Court's attention to Section 12 of an Act of Congress approved July 15, 1870 (16 S. L. P. 335) and wherein it was provided that the Great and Little Osages, when they had agreed, should be by the President removed from "the State of Kansas to lands provided or to be provided for them for a permanent home in the Indian Territory, to consist of a tract of land in compact form equal in quantity to one hundred and sixty acres for each member of the tribe."

The Osages subsequently moved to the Indian Territory and settled on what they believed to be the lands previously selected for them. After a survey had been made it was learned that the Osages had inadvertently settled on the wrong land. In 1872 (S. L. pp. 228-229) Congress passed an Act by the terms of which the Osages were permitted to retain the lands they then occupied and which were the lands by them occupied at the time of the Osage Allotment Act. It was provided in the Act of 1872 "that the location as aforesaid shall be made under the provisions of Article sixteen of the treaty of eighteen hundred and sixty-six, so far as the same may be applicable thereto."

The deed under discussion, therefore, represents the culmination of these things: (a) an agreement in connection with the consideration to be paid the Cherokees; (b) an acceptance on the part of the Cherokees of the Osages as being one of the friendly Indian Tribes that would be permitted to take fee simple title to a part of the lands included in the treaty of 1866; (c) an acceptance by the Osages of the lands they then occupied as their permanent lands and (d) a ratification by Congress of the Treaty of 1866 and all Acts made in connection with securing unto the Osages a permanent home.

No one will contend that the United States attempted to acquire the lands included in the deed for itself. Not once, but several times, it is recited in the deed that the United States was taking title in Trust. Why was title taken in trust? The answer is obvious. Title was taken in trust in order to comply with the solemn agreement with the Osages to provide for them a permanent home in what is now Oklahoma and the equally as solemn agreement with the Cherokees to place fee simple title either in common or severalty in the Indians that would be permitted to take lands covered in the Treaty of 1866. The United States did not wish to place the Osages in a position where they could alienate the lands, and by taking title in trust this possibility was circumvented. In brief, by taking title in trust the ownership of the Osages in the lands was effectively restricted, but this does not mean that the character or quantum of their title was debased.

To follow the appellant's contention that a vesting of fee simple title in the mineral rights, trust and surplus funds of the Osages was postponed until 1984, or an additional time if Congress saw fit to extend the time, would do violence to both the provisions of the Treaty of 1866, the Acts of Congress made in connection with the Osages and their lands and of the Allotment Act of 1906.

It is true that the United States did not agree to place fee simple title in the Indians that settled the land covered by the Treaty of 1866 at any particular time, but to say that the United States could and would postpone doing so for 127 years or longer is both unreasonable and unwarranted under the facts.

The general allotment act covering the lands and properties of the Osages became effective on June 28, 1906, (34 S. L. 539). It was therein stated and provided that the roll of the tribe should be established and each member was declared to be entitled to an equal share of "the tribal lands and tribal funds"; provision was made for the allotment to each member of a 160 acre "homestead," and a "surplus" allotment of about 500 acres.

Section 2 (7) provides that the Secretary of the Interior might, upon request, issue to an adult member of the tribe "a certificate of competency, authorizing him to sell and convey any of the lands deeded by reason of this Act, except the homestead * * * ."

In connection with the character of title conveyed to the allottee it was provided in Section 7:

"That the lands herein provided for are set aside for the sole use and benefit of the individual members of the tribe entitled thereto, or to their heirs, as herein provided."

In connection with the mineral interests it was provided in Section 3 that the minerals were "reserved to the Osage tribe for a period of twenty five years from and after the eighth day of April nineteen hundred and six."

Section 4 provides that all money due or to become due to the tribe shall be held in trust by the United States, but shall be "placed to the credit of the individual member of the * * * tribe on a basis of a pro rata division among" such members "as shown by the * * * roll of membership, * * * or to their heirs" and should draw interest and that the interest should be paid quarterly to the members.

Section 5 provides that at the expiration of the trust period the "lands, mineral interests, and moneys, * * * held in trust by the United States shall be the absolute property of the individual member of the Osage tribe."

It was also provided in Section 5 that at the expiration of the restricted period "deeds to said lands shall be issued to said members, or to their heirs, as (therein) provided, and said moneys shall be distributed to" the members or their heirs, and the member or heir shall have "full control of said lands, moneys and mineral interests."

Section 6 provides "that the lands, moneys, and mineral interest * * * of any deceased member of the Osage

tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma * * * ."

The appellant insists that by the terms of Section 5, and after the expiration of the restricted period, an Osage could not have title to the mineral interests until the United States issued a deed to him. If this be true of an Osage, it would be true of a white man who inherited a headright. This contention is without merit. In Section 5 three classes of property are considered, to-wit: lands, moneys and mineral interests. The language used in connection with the issuance of a deed is this: "deeds to said lands shall be issued," and it is nowhere in the Allotment Act provided that deeds shall be issued to the mineral interests at the expiration of the trust period. To the contrary the language used in connection with what shall happen to the mineral interests is that at the expiration of the restricted period the Osage, or his heirs, shall have "full control over said lands, moneys and mineral interests."

The language employed in connection with the issuing of a deed to lands at the expiration of the restricted period is surplusage. The Osages received deeds to their lands in 1909, which deeds conveyed a fee simple title subject only to the restrictions then existing or that might thereafter be imposed. Appellant will admit that when a certificate of competency is issued to him, without more an Osage has merchantable fee simple title to his surplus lands. The same situation would result as to all properties at the expiration of the restricted period. The fact that

the restrictions do not run with the land but depend on whether or not the owner is restricted is settled in *Levendale Lead & Zinc Mining Co. et al.* v. *Coleman,* 241 U. S. 432, 36 Sup. Ct. 644.

In that case Charles Coleman, a white man and husband of a deceased restricted full-blood Osage woman, inherited certain Osage land from his wife and a son who was a restricted Osage. After so inheriting the land he conveyed it by warranty deed to the Levendale Lead & Zinc Mining Company. Thereafter, he caused a quiet title action to be instituted against the grantee. His contention was, although no Indian owned an interest in the land conveyed when he conveyed it, that the restrictions imposed by Congress ran with the land and therefore the land was restricted in him. The Supreme Court of Oklahoma (43 Okla. 13, 140 Pac. 607) sustained this contention. This Court on appeal held, after reviewing the Allotment Act, that the restrictions did not run with the land but were limited to the individual holding title. We quote this portion of the opinion:

> "The provisions of the allotment act must be construed in the light of the policy they were obviously intended to execute. It was a policy relating to the welfare of Indians—wards of the United States. The establishment of restrictions against alienation 'evinced the continuance, to this extent, at least, of the guardianship which the United States had exercised from the beginning.' (Citing cases.) This policy did not embrace white men—persons not of Indian blood—who were not as Indians under national protection, although they might inherit lands from Indians; and,

with respect to such persons, it would require clear language to show an intent to impose restrictions."

We direct the Court's attention to the fact that Coleman did not obtain a deed from the United States or from any one else before he conveyed. The deeds from the principal chiefs, approved by the Secretary of the Interior, in 1909, together with the fact that Coleman was the heir of his Osage wife and father of an Osage child, completed his chain of title.

The appellant will not dispute the fact that a certificate of competency to an Osage Indian places in him full right to the enjoyment of the title he already had to all of his properties, save the right to sell the homestead, and save the right to grant mineral leases, without the issuance of a deed from the United States. He is then entitled to take all moneys accruing to his headright. This fact is established in the case of *Choteau* v. *Burnett*, 283 U. S. 691, 51 S. Ct. 598. The certificate of competency vested no new title but merely recognized the title already owned in fee.

In the *Choteau* v. *Burnett* case, Choteau, an Osage Indian, had been granted a certificate of competency. He had been assessed income taxes under the Federal Income Tax Act, and defended against the assessment on the theory that the income was exempt because of his status as an Indian, and urged that the moneys he received as the owner of interests in headrights was a gift. In holding that the income was taxable this Court discussed the object and

purpose of the Osage Allotment Act. We quote from Page 694 of the U. S. Report this portion of the opinion:

> "The course of legislation discloses that the plan of the government has been gradually to emancipate the Indian from his former status as a ward; to prepare him for complete independence by education and the gradual release of his property to his own individual management. This plan has included imposing upon him both the responsibilities and the privileges of the owner of property, including the duty to pay taxes. Pursuant to this policy, the act of 1906 directed the allotment to each member of the Osage Tribe of a homestead of 160 acres to be chosen by him, which was to be inalienable and nontaxable for twenty-five years or during the life of the allottee. After setting apart such homestead to each, the surplus lands were all to be equally divided and allotted amongst the members. Section 2, seventh, of the act provides that the Secretary of the Interior, after due investigation, may issue certificates of competency to members of the tribe. It declares that 'upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member (with exceptions not here material) shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States.' Since 1910, when he received his certificate, petitioner has therefore been taxable upon his allotted lands, except his homestead, and they have been freely alienable."

This Court goes on to say that after a certificate of competency has been issued to an Osage Indian he is fully emancipated, except in the matter of conveying his homestead and the granting of mineral leases. That "his share of the royalties from oil and gas leases is payable to him, without reservation upon his use of the funds so paid."

In *Taylor* v. *Irwin* (C. C. A. 10th), 60 Fed. (2d) 495, the Court held that an Osage headright, owned by a person not of Indian blood, passed to his trustee in bankruptcy. Therefore, that a white person could sell an Osage headright.

In its opinion, in this case the Supreme Court of Oklahoma stated that:

> "We reject at once as untenable the assertion that the title to this property remained in the federal government under the various laws applicable to the Osages. *Globe Indemnity Co.* v. *Bruce*, 81 Fed. (2d) 143, and *In: Martin's Estate*, 183 Okla. 177, 180 P. (2d) 561. * * * "

The appellant insists that this statement of the law is erroneous and if the Supreme Court of Oklahoma had not arrived at this erroneous conclusion as to title not being in the United States, it would have held for the Osages.

The appellee says that the statement so made by the lower court is the law, and submits it is sustained by the authorities.

In her argument the appellant overlooks the fact that the tax here involved is not a tax on property but is a tax imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. That benefits were transferred to and received by the heirs is not subject to dispute, and these facts are developed in the cases cited by the Supreme Court of Oklahoma in support of the above quotation, as an examination of those cases will disclose.

In the *Globe Indemnity Co.* v. *Bruce* case, 81 Fed. (2d) 143, decided by the 10th Circuit Court of Appeals, the question presented was whether or not the county court acquired jurisdiction of the quarterly payments that accrued to the credit of a deceased Osage woman of less than one-half Indian blood who had received a certificate of competency. The court held that such funds could be used in paying debts of the estate, and, therefore, that the county court had jurisdiction over the quarterly funds. In discussing the title of an Osage Indian in a headright, the Court said at page 150 that:

> "We are of the opinion that the United States took the legal title to the funds and moneys in trust, but that the beneficial title to the funds and moneys vested in the individual members of the tribe; that there was reserved to the tribe an interest in the minerals for a stated period; and that the reversionary interest in the minerals vested in the members of the tribe to whom were allotted the surface, all subject to the paramount power of Congress to deal with such property for the benefit of the tribe and its members.
>
> "This view is strengthened by a consideration of section 6 of the Act of June 28, 1906 (34 Stat. 545), which refers to 'the lands, moneys, and mineral interests,' of a 'member of the Osage tribe,' and provides such 'lands, moneys, and mineral interests * * * shall descend to his or her legal heirs.' This section indicates that a present equitable interest in the lands, moneys and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs."

In the other case cited in the quotation, *In re: Martin's Estate*, 183 Okla. 177, 180 Pac.(2d) 561, the Court in

speaking of the title to Osage Indian properties says at page 181 of the Oklahoma Report that:

> "The Osage Nation has no heirs, nor property subject to succession. All the lands, moneys, and other properties commonly said to belong to that nation and yet remaining undistributed to the individual citizens thereof, or their heirs, are now held in trust by the United States for the use and benefit of the individual citizen, or his heirs who are eligible. Act Cong. March 2, 1929, 45 Stat. L. 1478. The individual citizen, or his heirs, has a vested undivided interest in such lands, moneys, or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, not from the tribe to such heirs. In *Globe Indemnity Co.* v. *Bruce*, 81 Fed. (2d) (C. C. A. 10) 143, 150, the court, speaking of section 6 of the Act of Congress of June 28, 1906, said:
>
> " 'This section indicates that a present equitable interest in the lands, moneys, and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs.'
>
> "In referring to the 'lands, moneys, or mineral interests of the Osage Tribe,' Congress could have meant nothing other than the vested interests of the individual member thereof, which interest included his allotted lands and moneys and his vested, though undivided, interest in the minerals and other property commonly referred to as lands and mineral interests of the Osage Tribe. Congress was dealing with individual estates, for there was no other property to deal with. It merely referred to such individuals collectively as the Osage Tribe."

It is the shifting of economic benefits and the privilege of transmitting or receiving such benefits that Oklahoma here seeks to tax. It does not here seek to tax the properties of the Osage Indians as such.

The "Title" Cases Relied Upon by Appellant

In the cases cited and relied upon by appellant as supporting her contention that title was in the United States, the tax sought to be imposed was an ad valorem tax, not an excise tax, and which fact within itself distinguishes the cases from the case at bar.

We first refer to the case of *McCurdy* v. *United States*, 264 U. S. 484, 44 Sup. Ct. 345, and in which Osage County sought to impose an ad valorem tax on certain lands belonging to restricted Osages. The tax was assessed prior to the date and time that the allotment deeds were executed by the principal chiefs and approved by the Secretary of the Interior. In connection with the proposition of where title rested before the execution and approval of the deeds this Court said:

> "Title was in the United States on the date on which the assessment was made, and did not pass until the execution of the deeds. Section 8 * * * "

In brief, title was in the United States before the allotment deeds were executed and approved and in the individual Osages after they were executed and approved. The opinion therefore supports the appellee's contention. When title passed upon the execution and approval of the allotment deeds, the United States could not thereafter divest the Osages of title, without their consent. 27 Am. Jur. page 564.

In *United States* v. *Rickert*, 188 U. S. 432, 23 Sup. Ct. 478, ad valorem taxes were assessed on certain per-

manent improvements and personal property of the Sisseton band of Sioux Indians, and which assessments were attacked by the United States as a cloud on the lands of the United States.

This Court pointed out that under the Allotment Act there involved, the patents issued to the Indians shall declare that "the United States does and will hold the land thus allotted * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * * and that after the expiration of said period the United States will convey the same by patent to said Indians." That the word "patent" as used in the first part of the quoted portion of the Act, the word having various meanings, should be construed as used as imparting:

> " * * * nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold the land allotted, in trust for the sole use and benefit of the allottee, or, in case of his death, of his heirs, and subsequently, at the expiration of that period—unless the time was extended by the President—convey the fee, discharged of the trust and free of all charge or encumbrance. In other words, the United States retained the legal title, giving the Indian allottee a paper or writing, improperly called a patent, showing that at a particular time in the future, unless it was extended by the President, he would be entitled to a regular patent conveying the fee."

Therefore, the Indian did not have and possess the character of "title" that rested in the Osages under the Osage Allotment Act and the deeds executed pursuant thereto.

In *United States* v. *Board of Comr's* (C. C. A. 10th), 145 Fed. (2d) 329, Freemont County, Wyoming, assessed ad valorem taxes on land purchased by the United States for certain Shoshone Indians. Among other things provided for in the Act providing for a purchase was the following:

> " * * * and Section 6 provides that title to all land purchases made hereunder shall be taken in the name of the United States in trust for the Shoshone and Arapaho Tribes of the Wind River Reservation, and that all purchases shall have the approval of the Tribal Council, or the business committees thereof."

No such provision is to be found in any act or deed touching the title of an Osage.

Another case cited by appellant is *United States* v. *Thurston County*, 143 Fed. 287. Again we find that the tax assessed was an ad valorem tax, and that "the United States (held) each of (the allotments) 'for a period of twenty five years in trust for the sole use and benefit of the Indian to whom such allotments shall have been made, or in case of his decease, of his heirs.' " The assessment was on lands of the Omaha and Winnebago tribes and was made during the twenty-five year period.

At page 289 the Court says:

> "They are still members of their tribes and of an inferior and dependent race, of which the Supreme Court has said that 'from their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress, and by this court, whenever this question has arisen.' "

In the instant case the Osages are and have been for many years citizens. They are not "still members of their tribe," and the United States does not hold title to these Indians' lands in trust.

One of the basic distinctions between an ad valorem tax and an estate tax is that an ad valorem tax is often confiscatory and an estate tax isn't. An Indian in modest financial circumstances may find it impossible to pay an ad valorem tax assessed on his home, and though the tax may be small his home may be sold to satisfy the unpaid assessment. He thereby loses his home and may become destitute. The basic exemption under the Oklahoma estate tax law, where the estate goes to lineal heirs or surviving spouse, is $15,000.00. In computing the tax on the estate of an Indian, Oklahoma exempts the homestead irrespective of value and allows an exemption of $5,000.00 if the homestead is of a value under $5,000.00; expense of administration and a basic exemption of $15,000.00 where the estate is transmitted to lineal heirs. Let us turn to the record and see the amount of the exemption allowed in these cases: The exemption allowed in the West estate was $26,507.80 (R. 8A.) ($15,000.00 basic exemption; $5,000.00 homestead and $6,507.80 expense last sickness, of administration, etc.) The exemptions allowed are such that an Indian could never be made destitute by the assessing of this tax.

The Indian was granted an exemption from ad valorem taxes on his homestead in order to preserve to him

a home. (The surplus land of the Osages have been subject to an ad valorem tax for many years.) The preservation of a home was the object and purpose of the tax and we respectfully submit that it was never intended that an exemption be allowed an Indian from an estate tax. This tax could never destroy his home. Appellee respectfully points out that this Court so held in the *Five Civilized Tribes* case.

At page 11 of her brief, appellant cites and quotes from *Adams* v. *Osage Tribe of Indians* (C. C. A. 10th), 59 Fed. (2d) 653, as supporting her contention that title to the minerals is held by the United States in trust.

The appellant merely quotes the contention made by the United States as stated by the Court. The Court did not hold that title to the minerals was held in trust by the United States and to the contrary held that title and ownership was in the Osages. In the body of the opinion the Court said that Congress had full power, when it passed the Allotment Act, to make provision safeguarding the communal estate (the mineral rights under all of the lands of the Osages), and that "the necessary effect of this was to withhold the minerals from division, for the use and benefit of the tribe, not disturbing the tribe's communal equitable estate in them. It further provided that the minerals should become the property of the individual owners of the allotted lands at the expiration of twenty-five years from and after April 8, 1906 * * * and during this twenty-five years while the minerals remained communal prop-

erty," and during any extended restricted period, the restricted Osage could not maintain an action to quiet title to the minerals under his land.

The statement that the minerals were the "communal property" of the members of the Osage Tribe, or the statements in other cases cited by appellant that title was in the Osage Tribe, certainly is not authority supporting the contention of the appellant that title to the minerals is held in trust by the United States. In fact, it is authority supporing appellee's contention.

We repeat, that Oklahoma does not here seek to impose a tax on property as such. It seeks to impose a tax on the shifting of economic benefits from the dead to the living. So the matter of who holds title is not here determinative. What is determinative is whether beneficial rights were transmitted in the minerals and the other properties here involved. The United States definitely did not own or possess any beneficial ownership. It could take no part of the *corpus* or of the income therefrom for itself and all of which will eventually go to the Osages.

In connection with the minerals, the record discloses that the mineral rights under all of the lands was communitized. After having been communitized the communal estate thus created was divided pro rata among the original allottees, 2,229 in number. After having been so divided each allottee owned 1/2229th of the whole, and his ownership and that of his heirs was absolute. From then on he was entitled to 1/2229ths of all bonuses or production accruing to the whole, which he was not compelled to

share with any one. The Osage Tribe as a tribe had no right, title or interest in minerals after this division. Any member thereafter born into the tribe had no right, title or interest in the minerals because of his membership. If he ever took or received an interest it was through devise or inheritance from either an original allottee or some one who had taken under this original allottee. His interest in the minerals was in fact no different than that of the son or daughter of non-Indians in the properties of their parents and relatives. The white child takes by devise or inheritance and this is the only way the Osage Indian child may take. The fact that ownership is in the individual, and no one else, is illustrated by the fact that a non-Indian owner can sell his headright [*Taylor* v. *Irvin*, 60 Fed. (2d) 495] and that a headright can be sold to pay certain debts of an Osage. See page 147 of 81 Fed. (2d): Title passes under these sales without any action on the part of the tribe. Any action required by the Secretary of the Interior is because of the supervisory capacity conferred upon him.

The Osage Allotment Act effected a severance of the minerals from the surface, but this fact did not affect the title and ownership that came to rest in the Osages. It is to be remembered that the severance was not for the restricted period alone. The severance was for all time to come, and at no time will an original allottee, or his successors in title, ever own all of the minerals under any particular allotment. The ownership will always be a frac-

tional part of the whole. The Allotment Act made the whole of the lands of the Osages a unit, and divided this unit into units of 2,229ths equal parts. The plan was probably new and novel in 1906, but it isn't today. The expense incident to drilling test wells for oil and gas has been many times financed through a very similar plan. The owner of the lease divides it into a certain number of units, and sells some of the units to the public. If production is had the owner of a unit shares therein in the proportion that his unitized interest bears to the whole, and which "whole" is the original unit, the leasehold estate.

In connection with the production of oil and gas under the lands of the Osages, and bonuses received for oil and gas leases, we remind the Court that more than seventy-five per cent of it came from surplus lands and less than twenty-five per cent from homesteads. The appellant, therefore, is contending that all of the accruals from oil and gas production be exempted from an Oklahoma estate tax, notwithstanding more than seventy-five per cent comes from lands subject to ad valorem taxes.

The funds on hand in the United States Treasury at the date of the Osage Allotment Act, in the main came from the sale of certain lands of the Osages to the Kansas Indians. Let us turn to the basic instrument under which the United States conveyed to the Kansas Indians. This is the treaty of 1866 between the United States and the Cherokees. It was therein provided that the United States would convey in fee simple to each of the tribes therein

designated to whom it could so convey, and that the tribe to whom it conveyed should hold fee simple title by their members or in severalty. By the terms of this treaty the Osages, being a friendly Indian Tribe that received lands covered in the referred to treaty, took fee simple title either in common or in severalty, and having taken such ownership it was not debased or lessened when the lands were converted into money through the sale to the Kansas Indians. It is not necessary to determine whether their interest was communal in the funds when received; we suggest that it was. The fund by the terms of Section 4 of the Osage Allotment Act was divided into equal 2229ths parts and "placed to the credit of the individual membership * * * or their heirs." At all times since the funds were so divided the Osage allottee, or his heirs, has owned in his own right the share so distributed subject only to the restrictions placed thereon by the United States as the guardian of the Osages.

We have discussed all of the properties of the Osages except properties purchased for the individual Osages from funds held in trust by the United States, which funds were and are credited to the individual Osage's account. If the property purchased was real estate it was subject to ad valorem taxes and accordingly taxed. Any other properties purchased should be considered for estate tax purposes the same as the real estate and the funds with which they were purchased, and for such reason should be held to be properly includable in the estate for state tax purposes.

The fact that the United States pays interest on the funds of the Osages that it withholds from them, cannot be reconciled with the assertion that title is in the government. The owner of monies does not charge and collect interest thereon from himself. The allowance of interest is within itself a recognition on the part of the Federal government that the Osages are the owners of the funds.

The appellant says that the question of "title" was not presented by the United States in the *Five Civilized Tribes* case and was not passed on by this Court in that case. We suggest that the question was not presented for the reason that an estate tax is not imposed on property, but is an excise tax imposed on the transfer and receipt of economic benefits. While admitting that it was not directly presented, the appellant asserts that the Court effectively adjudicated this question favorably to the appellees. We refer to the case in support of our statement.

This Court distinguished the *Rickert* case, which case is the basis of appellant's contention, upon at least three grounds: First, in the *Rickert* case the rights and privileges of citizenship had not been bestowed upon the Osages (Congressional Act of March 3, 1921, Sec. 3, 41 Stat. 1250, did this) and the Osages on that date preserved their tribal status. Second, title was held in trust by the United States when the *Rickert* case arose, but as stated in the opinion title passed when the provision of the Allotment Act had been carried out by the execution and approval of the deeds. Third, that the Oklahoma estate tax is a tax based

solely upon ability to pay, therefore, not an ad valorem tax that may be confiscatory.

PROPOSITION No. 2

The imposition of an Estate Tax would not interfere with the government's duty to the Osages by diminishing the trust estate.

The above statement is a counter proposition to appellant's second contention, under which she asserts the imposition of the tax in controversy would interfere with the Government's duty to the Osage Indians by diminishing the trust estate; that if such taxes are permitted to be imposed the Government would not be in a position to meet the requirements of the Osage Allotment Act to the effect that the properties "shall be the absolute property" of the Osages at the expiration of the trust period.

The appellee suggests that the imposition of the tax in controversy will do no more to make it impossible to deliver *all* properties intact to the Osages at the expiration of the trust period, than does the imposition of a Federal estate tax. The fact that a Federal estate tax is imposed on the estates of restricted Osages is fully sustained by a letter from the Treasury Department to appellee. This letter is under date of August 16, 1944. Therein the Treasury Department not only states that the Federal government imposes the tax, but states the reason for doing so. The letter is short and we append a copy thereof to this brief.

Reluctantly the appelant admits in her brief that a Federal estate tax is imposed on the estates of restricted Osages, but suggests that this fact does not within itself establish the right of the Federal government to impose such a tax. We are unable to find where the exact question has been adjudicated, but the right to collect the tax is fully established in the *Five Tribes* case and in *Landman* v. *Commissioner*, 123 Fed. (2d) 787.

Repeating, we point out that in the *Five Tribes* case this Court held that:

> " * * * Congress cannot have intended to impose federal income and inheritance taxes on the Indians and at the same time exempt them by implication from similar state taxes."

Immediately preceding the quoted language this Court had cited the *Landman* case with approval and observed that under the authority of that case Indian estates were subject to Federal estate taxes.

Repeating again, we quote from the *Landman* case as follows:

> "There is nothing in the treaties or the Acts of Congress, confirmatory thereof, which prohibits the imposition of a tax on the right to inherit or succeed to non-taxable property rights. Here the tax falls upon the transfer or shifting of the economic benefits and not upon the property of which the estate is composed. It therefore is not within any constitutional immunity growing out of a contract or agreement between the United States and the Creek Indian, as characterized by the Act of April 26, 1906."

The estates of Indians are subject to both a Federal and State estate tax for the simple reason that the tax is

imposed upon the shifting and transmitting of economic benefits as the result of death, and because there is no law prohibiting the imposition of such a tax.

The appellant points out that the 10th Circuit Court in *Blackbird* v. *Commissioner* (C. C. A. 10th), 38 Fed. (2d) 976, held that the income of a restricted Osage was not subject to a Federal tax. The basis of the opinion holding that a restricted Indian was not subject to Federal income taxes was based upon the proposition that the Indian was not included within the Federal Income Tax Act.

Several years after the *Blackbird* case was decided, this Court in *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U. S. 418, 55 Sup. Ct. 820, held that the Circuit Court erred in the *Blackbird* case, and that a restricted Indian comes within the provisions of the Federal income tax law and that his income is subject to tax. This last referred to case has not been overruled, so we say that the income of restricted Indians is now and has been since the case was handed down subject to Federal income taxes.

In the face of the decision in the *Five Tribes* case holding that the right of a State to impose an estate tax on the estate of an Indian will not be denied where the Federal government imposes such a tax, appellant cites and quotes from *New York* v. *United States*, 326 U. S. 572, 66 Sup. Ct. 310, as holding that the Federal government can impose a tax on one of its instrumentalities and deny this right to a State.

This Court did not overrule the *Five Tribes* case in the *New York* case, and the appellant does not claim that it did. In that case the State of New York contended that the mineral waters it sold were exempt from Federal tax for the reason New York in selling the water was engaged in a "usual, traditional and essential governmental function". This Court held that New York had entered the market places the same as does an individual, and when it did so it divested itself of its quasi-sovereignty and assumed the character of a trader. As a trader it was subject to the tax, and the basis of the opinion was not and could not have been the right of the United States to tax one of its instrumentalities and deny the right to a State. This we say for the reason that the taxing of a Federal instrumentality was not involved. We do wish to point out that this Court, in speaking of the "instrumentality rule" had this to say at page 576 of the U. S. Report:

> "But the fear that one government may cripple or obstruct the operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that 'the power to tax involves the power to destroy.' *McCulloch* v. *Maryland*, 4 Wheat. 316, 431, 4 L. Ed. 579. To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have

been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. (Citing cases.) The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be 'instrumentalities of the government' for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. (Citing cases.)"

And this at page 581 of the same report:

"In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity." (Emphasis supplied.)

In the *New York* case this Court again says that it is still committed to a shift away from the old cases prohibiting many taxes on the theory that the tax burdens a governmental instrumentality, and this shift and new trend away from prior decisions is reflected in the *Five Tribes* case, *Helvering* v. *Mountain Producers Corporation* and others of the same purport.

The appellant under this proposition cites *U. S.* v. *Board of Com'rs of Osage County*, 193 Fed. 485, and the opinion on appeal in that case, reported in 216 Fed. 883, that title to the minerals under the allotted lands of the Osages is in the Osage Tribe. This case involved the im-

posing of ad valorem taxes, as do the other cases relied upon by appellant in connection with who in fact holds title.

We say that the original allottee took a fee simple restricted title to the 1/2229ths interest or unit assigned him. In any event, he became the equitable owner of the unit with all the rights incident to such ownership except the right to lease and sell and to take all of the income after the year 1925. Prior to that year he took all income accruing to the unit. As hereinbefore stated, no member born into the tribe after 1909 took any right, title or interest in any part of the minerals because of the fact that he became through birth a member of the tribe. He could never have any right, title or interest except by devise or by the operation of the laws of descent and distribution. (They could buy an interest.) It is the passing of an interest in the minerals by devise or the operation of the laws of descent and distribution, neither of which is a "federal instrumentality", that Oklahoma here seeks to tax.

The Osage Indians here, as did the Indians in the *Five Tribes* case, take under and by virtue of the laws of Oklahoma. They are citizens of Oklahoma with all the accompanying rights and privileges, and no good reason can be advanced why they should not shoulder the taxes imposed by the State of Oklahoma along with its other citizens.

PROPOSITION No. 3

The tax imposed is an excise tax imposed upon the shifting of economic benefits and the privilege of transmitting and receiving these benefits.

The above statement is a counter proposition to the appellant's third contention, and under which she argues that nothing in fact was transmitted or received under the will in the Dora Neal Rector Estate or under the laws of descent and distribution in the Charles West, Jr., Estate, upon which an estate tax could be imposed.

The fact that restricted Indians are here involved has nothing whatever to do with appellant's position under this proposition. If she is correct, an estate tax could not be imposed though the estates were those of non-Indians.

Before discussing any authorities we wish to note what we believe to be the common sense answer to the contention made by appellant under this proposition.

If nothing was owned by the deceased Indians and if nothing passed to their devisees and heirs at law why were the estates probated? The answer is that they were probated because valuable property rights were transmitted. What were these rights? (1) The very valuable right attaching to the ownership of an Osage headright, which ownership entitled the owner to receive quarterly payments, often as much as $1,000.00 each quarter. (2) The right to take all properties at the expiration of the restricted period, and practically all, excluding the homestead and

the right to lease the mineral interest owned, if a certificate of competency was issued. (3) The right to occupy as a home the lands. (4) The right to graze or farm the lands and take all of the grain therefrom. (5) The right, subject to the approval of the Secretary of the Interior, to lease for farming or grazing the lands and take the lease money. These are the rights that rested in and that were owned by the deceased restricted Osages. These are the rights that were by will in one instance, and by the law of descent and distribution in the other, that were transmitted to the devisees and heirs. These were all valuable property rights capable of ownership that passed under the laws of Oklahoma. These are property rights that Mrs. Rector and Mr. West in their lifetime could dispose of by will. If an heir at law were devised nothing, he thereby lost the right to share in these valuable property rights. If he was named as a devisee he shared in them.

Property is defined by the Oklahoma statutes as follows:

> "The term 'property' includes estate and right to lands, tenements and hereditaments.
>
> "The term 'personal property' includes every description of money, goods, chattels, effects, evidences of right in action and written instruments by which any pecuniary obligation, right or title to property, real or personal, is created or acknowledged, transferred, increased, discharged or diminished.
>
> "The term 'property' includes both real and personal property."
>
> Title 25, Section 26, Subsections 1, 2, 3 and 4.

When the above quoted definition of property is here applied, the fact that property was owned by the deceased Indians and was transmitted to their heirs is inescapable.

Our contention is clearly expressed in the case of *In re: Martin's Estate*, 183 Okla. 177, 80 Pac.(2d) 561, in the following language:

> "* * * The Osage Nation has no heirs, nor property subject to succession. All the lands, moneys, and other properties commonly said to belong to that nation and yet remaining undistributed to the individual citizens thereof, or their heirs, are now held in trust by the United States for the use and benefit of the individual citizen, or his heirs who are eligible. Act Cong., March 2, 1929, 45 Stat. L. 1478. The individual citizen, or his heirs, has a vested undivided interest in such lands, moneys, or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, *not from the tribe to such heirs* * * *" (Italics ours).

In *Globe Indemnity Co.* v. *Bruce* (C.C.A. 10th), 81 Fed.(2d) 1943, the court had this to say at Page 150:

> "* * * This section indicates that a present vested interest in the lands, moneys and mineral interests vested in the members of the tribe and on the death of a member descended to his heirs."

The court says that this view is further confirmed by the granting of permission to make a will, the practice of approving wills by the Secretary of the Interior, and that,

> "* * * this practice recognized that a member has a vested reversionary interest in the minerals and a vested interest in the trust funds which he may dispose of by will."

The court further points out that a "headright" is property and as such subject to be probated; that the per-

sonal representative took title to the headright and was accordingly entitled to the quarterly payments.

The estates of Osages were involved in the above referred to cases. In connection with whether property rights are owned and in fact pass upon the death of a restricted Indian we refer the Court to the *Five Civilized Tribes case* and *Landman* v. *Commissioner*. The "hollow estate" theory was directly presented in the *Landman case*, and the theory refuted.

We cite and quote from other cases that treat with the proposition of what interest the deceased must own, what interest must pass upon death, before a State can impose an estate tax. In the case of *Whitney* v. *State Tax Commission*, 309 U. S. 530, 60 Sup. Ct. 635, this Court held that it is not the decedent's enjoyment of property, nor even the acquisition of such enjoyment in their heir or devisee, that is the occasion of an estate tax, and that a tax can be laid irrespective of these facts. The facts in that case were briefly these:

Cornelius Vanderbilt created a trust under which a designated annual income was provided for his wife. The wife was given the power to will among the four children as she might choose, if she didn't exercise this power then the *corpus* to be divided equally among her four children. She chose to make a will.

We quote from Page 913 of the U. S. Report:

> "* * * She could not, that is to say, use the corpus of the trust herself, or appoint it to her estate; nor could she have applied it to her creditors. These quali-

fications upon Mrs. Vanderbilt's power over the appointive property had a significance during her lifetime which death transmitted. For when the end comes, no matter how absolute it may have been held, also comes to an end—except in so far as the power to determine its succession and enjoyment may be projected beyond the grave. But the exercise of this power is precisely the privilege which the state confers and upon which it seizes for the imposition of a tax. It is not the decedent's enjoyment of the property—the 'beneficial interest'—which is the occasion for the tax, nor even the acquisition of such enjoyment by the individual beneficiaries. Presumably the policy behind estate tax legislation like that of New York is the diversion to the purposes of the community of a portion of the total current of wealth released by death.

"In making this diversion, the state is not confined to that kind of wealth which was, in colloquial language 'owned' by a decedent before death, nor even to that over which he had no unrestricted power of testamentary disposition. It is enough that one person acquires economic interests in property through the death of another person, even though such acquisition is in part the automatic consequence of death, or related to the decedent merely because of his power to designate to whom and in what proportion among a restricted class the benefits shall fall."

The section of the New York statute under consideration in the *Whitney case* is set forth in the foot-note. It in substance is the same as Sub-section (3) of Section 989e, Title 68, O.S. 1941. This sub-section reads as follows:

"(3) To the extent of any interest therein of which the decedent has, at any time, made a transfer, in trust or otherwise, where the enjoyment thereof was subject, at the date of his death, to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend,

or revoke the terms of such trust, or where the decedent relinquished any such power in contemplation of his death, or where the decedent reserved to himself during his life the income from the property included in any such transfer."

We quote from *Graves* v. *Schmidlopp*, 315 U. S. 657, 62 S. Ct. 870, Page 872 of the U. S. Reporter:

"(1-3) For purpose of estate and inheritance taxation the power to dispose of property at death is equivalent of ownership (citing cases). It is a potential source of wealth to the appointee. The disposition of wealth effected by its exercise or relinquishment at death is one form of the enjoyment of wealth and is an appropriate subject of taxation. * * * His transfer of interest in intangibles, by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing. In both cases the sovereign's control over his person * * *."

In *Commissioner of Internal Revenue* v. *Holmes' Estate*, 326 U. S. 48, 66 Sup. Ct. 257, it is pointed out at Page 260, U. S. Reporter, that an estate tax can be imposed on the shifting of economic benefits irrespective of the vesting of title.

In *Graves et al.* v. *Elliott et al.*, 307 U. S. 383, 59 Sup. Ct. 915, this Court held that the power of disposing of property is the equivalent of ownership for the purpose of imposing an estate tax.

The cases cited by appellant under this proposition are cases wherein the property was transferred and where the transferrer divested himself of all interest and the transferee's interest therein became fixed prior to the death. The death did not enlarge, diminish or change the rights of any-

one. Not so here. The devisees and heirs of the deceased Osages did not take any part or interest in the properties until the death. It was only because of the deaths and the laws of descent and distribution of Oklahoma in one estate, and the will in the other, that they took any interest and estate at all.

PROPOSITION No. 4

No immunity from the tax here imposed was ever granted by Congress.

Under the above proposition the appellee will discuss the appellant's fourth contention that "the immunity from State taxation of the classes of property involved has never been withdrawn by Congress." The contention so made by appellant was made by the United States in the *Five Tribes case*. In refusing this contention this Court said:

> "* * * that restriction, without more, is not the equivalent of a congressional grant of estate tax immunity for the cash and securities.
>
> * * * * *
>
> "None of these cases held, nor has this Court ever decided, that congressional restrictions of an Indian's income carried an implication of estate tax exemption.
>
> * * * * *
>
> "Unless the tax immunity is granted by the restriction clause itself, there is not a word in the Act which even remotely suggests that Congress meant to exempt Indians' cash and securities from Oklahoma's estate taxes. We conclude that this Act does not exempt the restricted property from taxation for two reasons: (1) the legislative history of the Act refutes the contention that an exemption was intended; and (2) application

of the normal rule against tax exemption by statutory implication prevents our reading such an implication into the Act.

* * * * *

"If Congress intended to prevent a general non-discriminatory estate tax applying alike to all its citizens, it should say so in plain words. Such a conclusion cannot rest on dubious inferences. * * *"

This Court then points out that the Indians are citizens of Oklahoma and as such have all the privileges of full-fledged citizens; that an estate tax is based on ability to pay, and that it was not unreasonable that a small part of the expense of the State and local governments be borne by the Indians.

The Creeks and Seminoles could not point to any Act of Congress or treaty specifically exempting their estates from estate tax, and this is likewise true of the Osages. The Osages urge, as did the Creeks and Seminoles, that the applicable laws imply a tax exemption. This Court held otherwise in the *Five Tribes case.*

The fact that the restricted members of the Five Civilized Tribes are as completely and fully restricted as are the restricted members of the Osages is made apparent in *Landman* v. *Commissioner, supra.* The court there said:

"Title to whatever articles were purchased for the benefit of the decedent was retained in the United States. The decedent had no control whatsoever over the restricted funds, except the right to the exclusive benefit thereof, or so much as in the judgment of the Superintendent was required for the maintenance of herself and family."

and,

> "* * * the heirs are likewise restricted Indians and the estate passed to the heirs by the simple expedient of transferring the account of the decedent with the United States Treasury to the restricted heirs according to their respective shares, which was effected by a bookkeeping transaction in the office of the Superintendent of the Five Civilized Tribes."

The office of the Federal government to the Osages is the same as it is to the members of the Five Civilized Tribes. The relationship in both instances is that of guardian in the Federal government and that of ward in the Indians. Through this relationship the Federal government exercises a limited control over the Indian. We say limited, because the Osage Indian has the right to till and graze his lands and to take without limitation or restriction any and all monies arising from this source. In discussing this relationship the court in the *Landman case* said that,

> "* * * we can find nothing in the nature of the control exercised by the Superintendent as the guardian of the Indian ward that would justify the application of the instrumentality rule,"

and, that,

> "* * * it is plain, therefore, that the dominion exercised over the estate of the decedent by the Superintendent was in the nature of a guardianship for the sole and exclusive benefit of the decedent and her family, and for her protection, and would not vest in the government a control exercised in furtherance of a public purpose now thought to be essential to exemption from taxes under the instrumentality doctrine."

The tax here imposed was not imposed on the property of anyone. The deceased Indian was dead and for such reason she no longer owned property. The devisees and heirs had not as yet received any property from the Osages that died. The tax attached as the economic benefits shifted from the dead to the living, and attached because of the right given to the living to take from the dead. The right to transmit and receive is not a natural right. It must flow from operation of law.

The fact that an estate tax is not a tax on the property transmitted is fully developed by the case of *United States* v. *Perkins*, 163 U.S. 625, 16 S.Ct. 1073. In that case property was bequeathed by will to the United States. It was contended that to impose a state estate tax would constitute the taxing of property of the United States. This Court said "no." That,

> "* * * the tax is not upon the property, in the ordinary sense of the term, but upon the right to dispose of it, and it is not until it has yielded this contribution to the state that it becomes the property of the legatee,"

and,

> "* * * that the tax is not a tax upon the property itself, but upon the transmission by will or by descent."

It was also pointed out that,

> "* * *the legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax, and it is only upon this condition that the legislative assents to a bequest of it."

In *Snyder* v. *Bettman*, 109 U. S. 249, 23 Sup. Ct. 803, we find the converse of the *Perkins case*. In that case the United States imposed a succession tax upon a bequest to a municipal corporation of a state for a corporate and public policy.

The municipality contended that the tax could not be imposed because (1) the Federal government did not have and could not exercise the right to regulate the devolution of estates and (2) the municipality was a political subdivision of the state and being an instrumentality of a state Congress had no power to impose the tax on it. This Court decided both contentions adversely to the municipality.

As to the first proposition, the Court held that the power to regulate the descent of property is not a condition precedent to the power to impose an estate tax.

In connection with the second contention, it held that:

> "Conceding fully that Congress has no power to impose a burden upon a state or its municipal corporations, the question in each case is whether the tax is direct or incidental, * * * as the tax in the case under consideration is collected from the property while in the hands of the executor (#30) * * * we do not regard it as a tax upon the municipality, though it may operate incidentally to reduce the bequest by the amount of the taxes. * * *"

In brief, the tax was imposed while in the process of being transmitted from the dead to the living, and was therefore not a tax on the property of the municipality and did not burden a governmental instrumentality.

The cases cited by appellant under the proposition are cases wherein the instrumentality rule was applied to defeat the imposition of the tax. In none of them, excepting *Childers* v. *Pope*, 119 Okla. 300, 249 Pac. 726, was an estate tax involved. We refrain from burdening this brief with a discussion of those cases for the reason that the *Five Tribes case* is decisive on the proposition that the right to impose the tax herein involved will not be denied on the theory that it burdens or interferes with a Federal instrumentality, and for the further reason that in the opinion below in this case the Supreme Court of Oklahoma overruled the *Childers* v. *Pope case.*

In speaking of *Childers* v. *Pope* and *Childers* v. *Beavers*, 270 U. S. 555, 46 Sup. Ct. 387, the Supreme Court of Oklahoma in the opinion below had this to say:

> "Since our former decision in *Childers* v. *Pope, supra,* was based solely upon a following of the rule in *Childers* v. *Beavers, supra,* and since the Supreme Court of the United States in reversing various former decisions has itself 'in effect overruled' *Childers* v. *Beavers,* we are at liberty to depart from following it."

This Court in the *Five Tribes case* stated that,

> "*Childers* v. *Beavers, supra,* was in effect overruled by the *Mountain Producers decision.*"

It follows that neither *Childers* v. *Pope* nor *Childers* v. *Beavers* stand as a bar to the imposing of a tax in the instant case. Both cases have been overruled by the Court from which they came.

In the opinion below the Supreme Court of Oklahoma pointed out that the holding in *Childers* v. *Pope* that the portion of the estate of a restricted Indian consisting of land and minerals was not subject to the Oklahoma estate tax was not original with it,

> "* * * and that it is obvious the opinion was forcibly adopted by the controlling circumstances of an intervening opinion by the Supreme Court of the United States, to-wit: *Childers* v. *Beavers*, 270 U. S. 555, 70 L.ed. 730(7). It will be observed in reading the *Childers* v. *Pope* opinion that the decision was based solely on the rule of the *Beavers case, supra*, and in the *Pope case* this Court remarked it was not 'disposed to go further than the rule therein announced.' "

The appellant infers that after minerals are severed from the surface by conveyance (or by operation of an Allotment Act such as here involved) that Oklahoma imposes some form of tax thereon. The facts are that Oklahoma does not now and never has imposed any form of tax on minerals as such prior to production. In *State* v. *Shambin*, 185 Okla. 126, 90 Pac.(2d) 1053, the court held in the fifth syllabus that:

> "The Legislature has not provided for a severance of the various interests which may be held in real property for purposes of taxation."

In the seventh syllabus held that:

> "Oil and gas, while lying in the strata of earth from which they are produced must be taxed as real property to the owner of the land, if the land is taxable, under which for the time being they may lie."

To the same effect are the cases of *Secrest* v. *Williams*, 185 Okla. 449, 94 Pac. (2d) 252 and *Smith* v. *Anderson*, 196 Okla. 26, 162 Pac. (2d) 178.

It follows, that the Osages have always paid indirectly a tax on the minerals underlying their surplus lands because as the owners of the surface they paid an ad valorem tax thereon. For the same reason, they have never paid a tax on the minerals underlying their homestead land. We are speaking of a tax on minerals before production. In all instances the Osages have since 1921, paid gross production taxes on their interest in the oil and gas produced from both their surplus and their homestead lands.

At Page 25 of the brief, appellant suggests that Congress is without power to grant unto Oklahoma the right to impose an estate tax on those properties of the Osages that are connected with the minerals. This position is clearly refuted by *Gypsy Oil Co.* v. *Oklahoma Tax Commission*, 6 Fed. Sup. 6, wherein the right of Oklahoma to impose under the Federal Act a gross production tax on the production of oil and gas accruing to the Osages was sustained, and which case is for such reason authority supporting the proposition that Congress does not consider that a diminishing of the properties of the Osages through a non discriminatory tax prevents the carrying out of any provision of the law requiring a delivery of the properties to the Osages intact at the expiration of the trust period. This is further demonstrated by the fact that the Federal

government imposes both estate and income taxes on the Osages.

PROPOSITION No. 5

The tax here imposed is a non-discriminatory tax and does not burden an instrumentality of the government. The effect of the tax upon the government, if any, is extremely remote and inconsequential.

The right of a State to tax where Indians are involved has been denied in some cases on the theory that the tax sought to be imposed burdened a Federal instrumentality. No specific discussion of this principle is to be found in the brief of the appellant, but the principle does lurk in the background throughout her brief.

The tax here imposed is not imposed either directly or indirectly on property of the United States. It in fact is not a tax on the property of anyone. It is neither a tax on the living nor the dead. *United States* v. *Perkins, supra; Snyder* v. *Bettman, supra,* and other cases herein cited. It is an excise tax imposed on the transmitting of economic benefits from the dead to the living. The tax will never indirectly fall upon the United States because the Osages are not supported either in whole or in part from the United States Treasury. Their vast wealth is a matter of common knowledge throughout the United States and they need no financial aid from the Federal government.

The only way in which the United States is affected by an imposing of the tax, is the resulting accounting work

in the offices of the Federal agencies that supervise the affairs of the Indians. The supervisory work that is made necessary by the imposing of the tax is remote and inconsequential, and such work has never been adjudged to be such a burden as will defeat a tax. No one will assert that this work interferes with or impairs the efficiency of the various supervising agencies, or deprives these agencies of the power to serve the government in the manner that it was intended that they should serve it. The fact that the tax must directly and substantially interfere with and impair the agency before it will be denied is stated at Page 1288, § 607, of Cooley on Taxation, Vol. 2, 4th Ed., in the following language:

> "Note this important limitation: agencies of the Federal government are exempt from state taxation only so far as such taxation may interfere with or impair their efficiency in performing the function by which they serve the government. This has been stated over and over again. The state may tax the property of Federal agencies with other property in the state, and as other property is taxed, when no law of Congress forbids, and when the effect of the taxation will not be to defeat or hinder the operation of the national government. A different rule, as has been well said, 'would remove from the reach of state taxation all the property of every agent of the government. Every corporation engaged in the transportation of mails or of government property, of every description, by land or water, or in supplying materials for the use of the government, or in performing any service of whatever kind, might claim the benefit of the exemption,' and the effect would be to embarrass and injure the state to the benefit of individuals rather than of the nation. The test is whether the tax deprives the persons or corporations taxed, in truth, of power to serve

> the government as they were intended to serve it, or hinder the efficient exercise of that power."

That immunity from taxation does not extend to anything lying outside or beyond governmental functions and their exertions, and does not exist where the exercise of governmental functions is only remotely influenced, is settled in the case of *Fox Film Corp.* v. *Doyal*, 286 U. S. 123, 52 Sup. Ct. 546, and by the cases therein cited. It is therefore necessary for the appellant to here show that the tax imposed directly interferes with and directly burdens something that can be said to be a governmental function. This she cannot do.

In *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376, 58 Sup. Ct. 623, this Court committed itself to the rule that "where no direct burden is laid upon the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government" the right of the state to tax will not be denied. We quote from Page 385 of the U. S. Report:

> "In numerous decisions we have had occasion to declare the competing principle, buttressed by the most cogent considerations, that the power to tax should not be crippled 'by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only remote, if any, influence upon the exercise of the functions of government.' *Willcuts* v. *Bunn*, 282 U. S. 216, 225, 51 S. Ct. 125, 127, 75 L.ed 304, 71 A.L.R. 1260, and illustrations there cited."

The fact that this Court is now committed to the rule announced in the *Mountain Producers case*, and other cases of the same purport, is established in *New York* v. *United States, supra.* In that case this Court said that,

> "* * * in the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity."

This case is cited and quoted from at Pages 41 to 42, inclusive, of this brief, and to which we respectfully refer the Court.

The right to impose the tax here involved is not impliedly denied under the instrumentality rule, because the tax does not burden either directly or indirectly the Federal government or any agency thereof. It is also well settled that non-taxability will not be implied from the imposing of restrictions. In the case of *United States* v. *Board of Com'rs of Osage Co.* (C.C.A. 8th), 216 Fed. 883, appeal dismissed 244 U. S. 663, the Court held that non-taxability and non-alienability were separate and distinct things; that irrespective of the fact that surplus land of the Osages was made inalienable for at least twenty-one years and the imposing of an *ad valorem* tax thereon expressly denied for three years, an *ad valorem* tax could be imposed at the expiration of the three-year period notwithstanding it was not specifically provided in the Act that the surplus lands would be subject to an *ad valorem* tax too at the expiration of the three-year period. In the *Five*

Tribes cases this Court held that restrictions without more, is not the equivalent of a Congressional tax immunity.

See also:

Choate v. *Trapp, supra.*

Any suggestion that Oklahoma agreed, as a condition to admission to the Union or otherwise, either expressly or impliedly not to impose a tax where restricted Indians are involved, absent treaty or Federal law prohibiting the tax, is flatly contradicted by Sec. 5 of Art. 10 of Oklahoma's Constitution:

> "The power of taxation shall never be surrendered, suspended, or contracted away. Taxes shall be uniform upon the same class of subjects."

Taxes are the very life-blood of a State, and the taxing power of a State is never presumed to have been relinquished. Oklahoma did not expressly relinquish her sovereign power as a State to tax, and no implied relinquishment can be found in her Constitution or the Enabling Act. The provision of the Constitution that (1) Oklahoma disclaims all right and title to unappropriated lands and the lands of Indians (Art. I, Sec. 3) is directed solely to the claiming of lands and not the taxing thereof. Oklahoma does not here seek the lands of any Indian. She merely seeks the right to impose a tax and which if allowed can and will be paid from monies to the credit of the interested Indians in the Federal treasury. (2) Oklahoma agreed to recognize exemptions created by treaty or Federal law (Art. X, Sec. 6). No treaty or Federal law exempts

the estates of Osages from an Oklahoma estate tax. For such reason Section 6 has no application. (3) In the Enabling Act (Sec. I thereof) Oklahoma agreed in substance that nothing in the Constitution should be construed to limit the right and authority of the Federal government over the Indians and their lands. She is not here disputing the right and authority of the Federal government to exercise exclusive supervisory authority over the Indians. She does assert that in exercising this right the Federal government wholly failed to either directly or indirectly prohibit the imposing of the tax in controversy.

In *Coyle* v. *Smith*, 221 U. S. 559, 31 S. Ct. 688, this Court held that when Oklahoma was admitted to the Union she was admitted on equal footing with the other States; that Congress in admitting Oklahoma was without power to impose any restrictions that would deprive her of equality with other States.

The imposing of the tax in controversy is nowhere expressly denied. It is not impliedly denied because the tax does not directly or indirectly burden the Federal government or any agency thereof.

A late and comprehensive state case holding that *Helvering* v. *Mountain Producers Corporation, supra,* overruled the former cases inhibiting a tax of the exact nature here involved is that of *Santa Rita Oil Co.* v. *State Board of Equalization* (Mont.), 116 Pac.(2d) 1012. From the body of that opinion at Page 1014 (Pac.), the court said:

"With reference to the other two taxes the defendant's contention is that the law has been changed, not by Congressional Act, as contemplated in the decision, but by judicial interpretation. As its authority upon the question this court in its decision cited *Choctaw, O. & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L.ed. 234; *Gillespie* v. *State of Oklahoma*, 257 U. S. 501, 42 S. Ct. 171, 66 L.ed. 338; *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609, 46 S. Ct. 592, 70 L.ed. 1112, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443, 76 L.ed. 815. The *Choctaw, Gillespie* and *Jaybird cases* held the lessees of Indian trust patent land to be such instrumentalities of the Federal government, and the *Coronado case* held lessees of state school lands to be such instrumentalities of the state government that their proceeds under the leases could not be taxed by the other government. The United States Supreme Court clearly considered the questions identical and in each case denied the right of either the State or the Federal government to impose the tax on the instrumentality of the other. In 1938 the United States Supreme Court in *Helvering, Com'r. of Internal Revenue* v. *Mountain Producers Corporation*, 303 U. S. 376, 58 S. Ct. 623, 626, 82 L.ed. 907, involving a federal tax upon the producer's share of oil taken from state school lands expressly overruled the *Gillespie* and *Coronado cases* upon the point, and in so doing necessarily overruled also the *Choctaw* and *Jaybird cases* and many others like them. The holding was not that the lessee of State or Federal land was not an instrumentality of the State or Federal government, but rather that the tax upon the instrumentality did not under the circumstances constitute an interference with governmental functions.

* * * * *

"The decisions then cited a number of authorities and concluded:

" 'These decisions in a variety of applications enforce what we deem to be the controlling view—that

immunity from non-discriminatory taxation sought by a private person for his property or gains because he is engaged in operations under a government contract or lease cannot be supported by mere theoretical conceptions of interference with the functions of government. Regard must be had to substance and direct effects. And, where it merely appears that the one operating under a government contract or lease is subjected to a tax with respect to his profits on the same basis as others who are engaged in similar businesses, there is no sufficient ground for holding that the effect upon the government is other than indirect and remote. We are convinced that the rulings in *Gillespie* v. *Oklahoma, supra,* and *Burnet* v. *Coronado Oil & Gas Co., supra,* are out of harmony with correct principle and accordingly they should be and they now are, overruled.

" 'In the instant case we find no ground for concluding that the tax upon the profits of Wyoming Associated derived under its lease from the state constituted any direct and substantial interference with the execution of the trust which the state has assumed, and the decision of the Circuit Court of Appeals (10th Cir.,) 92 Fed.(2d) 78, to the contrary must be reversed.' "

CONCLUSION

At all times since the provisions of the Osage Allotment Act were carried out (1909), the individual Osage allottees, and their heirs, have held and owned a restricted fee simple title in and to all of their properties by virtue of which all beneficial rights of ownership have rested in them. These rights include the right to farm or graze all of the lands and to take all the gains arising from such pursuits without restraint or restriction on the disposition

thereof, the right to quarterly payments; the right to control absolutely practically all of the properties free and clear of restrictions upon a certificate of competency being granted and the right to control absolutely all of the properties free and clear of restrictions at the expiration of the restricted period. These are all valuable property rights and were transmitted from Charles West, Jr., at his death, to his surviving wife and spouse — rights they had not theretofore enjoyed and thereafter only enjoyed because of the death of Charles West, Jr. It is the transmission of these economic benefits that the State of Oklahoma here seeks to tax. It does not seek to tax any property as such of Charles West, Jr. He is dead. After his death he had no property. It does not here seek to tax the property of his surviving mother and spouse because the tax attached before they received the property. The tax in controversy is not a tax on property. It is a non-discriminatory excise tax imposed on the transmission of economic benefits from the dead to the living.

No agency of the federal government is here protesting the assessment. It is protested by individual citizens of the State of Oklahoma. They assert that the tax should be denied because it is imposed on a Federal instrumentality. They have not shown, and cannot show, wherein the tax directly burdens the federal government or wherein the imposition thereof hinders or impedes the functions of any agency thereof. Since an imposing of the tax will neither

burden, hinder nor impede the Federal government, the appellant's position is not well taken.

The Appellee again says that the *Five Tribes case* is here controlling and that the judgment of the lower court should be sustained.

Respectfully submitted,

C. W. KING, General Counsel,
R. F. BARRY,
Oklahoma City, Oklahoma,
Attorneys for Oklahoma Tax Commission.

JOE M. WHITAKER,
Of Counsel.

MARCH, 1948.

APPENDIX I

Letter from the Treasury Department relating to the inheritance and estate taxes collected by the Federal government and is attached as Appendix I:

"TREASURY DEPARTMENT
Washington, 25
August 16, 1944

MT-DC-SRC,

Mr. J. Frank Martin,
Chairman, Oklahoma Tax Commission,
State of Oklahoma,
Oklahoma City, Oklahoma.

CWK:GN

Dear Mr. Martin:

Reference is made to your letter of July 25, 1944, requesting that you be advised under what authority Osage Indian trust funds and headrights are subject to inclusion in the gross estate of the deceased owner for Federal estate tax purposes. You also ask whether any other Federal taxes are imposed in respect of such property as a consequence of the death of the owner and request advice as to the manner in which the estate tax on the trust funds and headrights is set up and collected.

Section 811 of the Internal Revenue Code provides:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.
>
> "(a) Decedent's interest. To the extent of the interest therein of the decedent at the time of his death; * * *"

Section 81.13 of Estate Tax Regulations 105 provides:

> "Property of Decedent at Time of Death. It is designed by the foregoing provisions of the Internal Revenue Code that there shall be included in the gross estate all property of the decedent, whether real or personal, tangible or intangible, the beneficial ownership of which was in the decedent at the time of his death, except real property situate outside of the United States."

At the time of the passage of the Osage Allotment Act of June 26, 1906 (34 Stat. 539), the Osage Indians were occupying as a tribe their reservation in Oklahoma Territory containing approximately one and one-half million acres of land largely underlaid with oil, gas and other minerals. At the same time the Goverment held in trust for the tribe which consisted of 2,229 members, a fund of over eight million dollars received by the tribe as compensation for the relinquishment of other lands. The Act of June 26, 1906, provided for the allotment of the reservation lands to the members of the tribe, but the Act specifically reserved the oil, gas, coal and other minerals to the Osage Tribe for a period of twenty-five years from and after April 6, 1906 (unless further extended by Congress) and at the expiration of said period, the minerals were to become the property of the individual owner of the land. Section 4 of said Act provided that all funds of the Osage Tribe, all moneys due, and all moneys that may become due to the tribe, shall be held in trust by the United States for a period of twenty-five years from and after January 1, 1907, and that such funds should be segregated and placed to the credit of the individual members of the tribe on the basis of a *pro rata* division, as soon as practicable after January 1, 1907. Section 5 of the same Act provides that after the expiration of the twenty-five year trust period "the lands, mineral interest and moneys, hereinbefore provided for and held in trust by the United States shall be the absolute property of the individual

members of the Osage Tribe according to the roll * * * or their heirs, as herein provided, and deed to said lands shall be issued to said members or to their heirs * * * and said moneys shall be distributed to said members or to their heirs." The twenty-five year trust period was extended by the Act of March 3, 1921, to 1946, and was extended by the Act of March 2, 1929, to April 8, 1958.

In *Globe Indemnity Company* v. *Bruce*, 81 Fed. (2d) 143, *certiorari* denied, 297 U. S. 716, the Tenth Circuit Court of Appeals defined as Osage "headrights" to be the "right to receive the trust funds and the mineral interest at the end of the trust period, and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estates and the interest on the trust funds." In holding that an Osage Indian owns a vested interest in his headright the Court said, in part:

> "We are of the opinion that the United States took the legal title to the funds and moneys in trust, but that the beneficial title to the funds and money vested in the individual members of the tribe; that there was reserved to the tribe an interest in the minerals for a stated period; and that the reversionary interest in the minerals vested in the members of the tribe to whom were allotted the surface, all subject to the paramount powers of Congress to deal with such property for the benefit of the tribe and its members.
>
> "This view is strengthened by a consideration of Section 6 of the Act of June 28, 1906 (34 Stat. 545), which refers to 'the lands, moneys and mineral interests,' of a 'member of the Osage Tribe,' and provides such 'lands, moneys and mineral interests * * * shall descend to his or her legal heirs.' This section indicates that a present equitable interest in the land, moneys and mineral interests vested in the members of the tribe and on the death of a member descends to his heirs.

> "* * * This practice (by the Secretary of the Interior) recognized that a member has a vested reversionary interest in the minerals and a vested right in the trust funds which he may dispose of by will."

The Supreme Court of Oklahoma in the case of *In re: Martin's Estate* (Okla. 1938), 80 Pac. (2d) 561, 566, stated:

> "The individual citizen (member of Osage Tribe) or his heirs, has a vested undivided interest in such lands, moneys or other properties, and such interest is an estate that may pass from the citizen to his heirs by inheritance, not from the tribe to such heirs."

As the Osage Indian owns a vested interest in his right to share in the tribal trust funds and mineral interests which passes upon his death to his heirs or devisees, the value of his interest in the property is includible in his gross estate under the provisions of Section 811(a) of the Internal Revenue Code. The decision of this office to include the headrights as a part of the decedent's gross estate was made June 25, 1940, and is applicable only to estates of decedents dying after June 25, 1940.

No Federal taxes other than estate taxes are imposed on the transfer by the death of the owner of the trust funds and headrights.

The interest of the decedent in the tribal trust funds and headrights is includible in the gross estate the same as any other property of the decedent and the estate tax is assessed and collected as in the case of a non-Indian except that the Superintendent of the Osage Indian Agency is regarded as the executor for the purposes of assessment and collection of the tax.

Very truly yours,

/s/ Joseph D. Numan, Jr.
Commissioner."

APPENDIX II

For the information of the Court as to the general situation covering Oklahoma Indians' funds held in trust by the government, the following tables are appended for such reference as the Court may find convenient and designated as Appendix II. This statement covers status of funds as to Oklahoma Tribes as of June 30, 1944, and as of June 30, 1947.

FUNDS HELD IN TRUST FOR INDIVIDUAL INDIANS AND ASSOCIATIONS OF INDIVIDUAL INDIANS OF THE STATE OF OKLAHOMA AS OF JUNE 30, 1944

AGENCY	CHECKING ACCOUNTS WITH THE TREASURER OF U. S.	INVESTMENTS IN BONDS ON DEPOSIT IN TREASURY		INVESTMENTS HELD BY SUPERINTENDENT	BANK DEPOSITS	TOTAL
		GROUP	INDIVIDUAL			
Cheyenne and Arapaho	$ 46,987.51	$ 35,000	$ 5,587.50	$	$	$ 87,575.01
Kiowa	302,575.24		415,187.50		53,300.00	771,062.74
Osage	57,362.40	11,672,000	4,066,025.00	1,127,262.15		16,922,649.55
Pawnee	10,296.46	125,000	218,637.52	11,829.58		365,763.56
Quapaw	87,660.79	3,335,000	974,091.00			4,396,751.79
Shawnee	18,534.98	194,000	39,040.00			251,574.98
Five Civilized Tribes	104,193.59	9,098,000	12,912,279.62	9,749.13		22,124,222.34
	$627,610.97	$24,459,000	$18,630,848.14	$1,148,840.86	$53,300.00	$44,919,599.97

Funds Held in Trust for Individual Indians and Associations of Individual Indians of the State of Oklahoma as of June 30, 1947

Agency	Checking Accounts with the Treasurer of U. S.	Securities		Investments Held by Superintendent	Total
		Group	Individual		
Cheyenne and Arapaho	$ 75,505.10	$ 35,000.00	$ 2,425.00	$	$ 112,930.10
Five Civilized Tribes	198,565.38	9,998,000.00	11,982,423.75	14,138.58	22,193,127.71
Kiowa	714,359.53	150,000.00	398,533.75		1,262,893.28
Osage	32,241.51	10,122,000.00	3,860,793.75	820,761.24	14,835,796.50
Pawnee	222,612.92	125,000.00	227,890.08		575,503.00
Quapaw	311,473.07	3,335,000.00	1,102,875.00		4,749,348.07
Shawnee	234,306.17	194,000.00	13,396.25		441,702.42
TOTALS	$1,789,063.68	$23,959,000.00	$17,588,337.58	$834,899.82	$44,171,301.08